APPENDIX A.*

Illustrative Instances in which Legislatures have Diminished the Bundle of Rights called "Property" by Laws which have been Upheld in the Courts.

PUBLIC UTILITY CASES.

In the public utility field, probably the most radical deprivation of property right is that to be found in the voluminous legislation fixing or limiting the *price* which the owners may charge for the use of their possessions, or to put it another way, limiting the right to *sell* their service. Such legislation (most obviously in the case of utilities not traditionally public utilities, such as insurance companies), takes away the valuable right to charge what the owner sees fit for the use of his property, and of course this deprivation has been uniformly upheld.

Taking away the right to fix a price for the use of things owned

Price regulation has not only been upheld with reference to railroad,[12] grain elevators,[13] telephone and telegraph,[14] and gas[15] utilities, but also a variety of activities not regarded at the time the business was entered into as "affected with a public interest." Thus we have legislation depriving owners of the right to charge what they please in the following businesses: INSURANCE—*German Alliance Ins. Co. v. Lewis*, 233 U. S. 389 (1913); PIPE LINES—*Pipe Line*

*This Appendix is the product of a special research into the Nature of Property in Constitutional Law, carried on by David E. Lilienthal of the Illinois Bar, in association with present counsel.

[12] *Peik v. Chicago, etc., Railway*, 94 U. S. 164 (1877); *Missouri R. R. v. Coal Co.*, 244 U. S. 191 (1917).

[13] *Munn v. Illinois*, 94 U. S. 113 (1877).

[14] *Western Union v. Myatt*, 98 Fed. 335 (1899).

[15] *Cleveland, etc., Company v. Cleveland*, 71 Fed. 610 (C. N. D. Ohio, 1891).

Cases, 234 U. S. 548 (1914); STOCKYARDS—*Cotting* v. *Kansas City, etc., Co.*, 183 U. S. 79 (1901); DISTRIBUTION OF ICE—*Oklahoma Light, etc., Co.* v. *Corporation Commission*, 96 Okla. 19 (1923); COLD STORAGE WAREHOUSING—*Public Utility Commission* v. *Refrigerating Co.*, 267 Ill. 528 (1915); SELLING THEATER TICKETS—*People* v. *Weller*, 237 N. Y. 316 (1924); *In re Opinion of Justices*, 247 Mass. 589 (1924); SELLING COAL—*American, etc., Co.* v. *Special Coal & Food Commission*, 268 Fed. 563 (D. Ind. 1920); RENTING DWELLINGS—*Holding Company* v. *Feldman*, 256 U. S. 170 (1921); *Block* v. *Hirsch*, 256 U. S. 135 (1921); SALE OF STEAM HEAT—*State ex rel.* v. *Public Service Commission*, 298 Mo. 303 (1923); LAUNDRY SERVICES—*Oklahoma Operating Co.* v. *Love*, 252 U. S. 331 (1920).[14]

Prescribing the Use to which things owned shall be put.

Legislation which requires the owner of property to put that property to a definitely prescribed use of course deprives the owner of the right previously enjoyed of putting his property to whatsoever use he wished. Such legislation in the public utility field is voluminous and we shall list below only a few of the outstanding and typical instances in which such utilities have been deprived by the law of this very valuable right, and have had imposed upon them the affirmative obligation of using their possessions in a prescribed manner.

A railroad company may be required to fence its tracks,[15] to protect[16] or abolish grade crossings.[17] Car-

[14] On the whole subject see Rottschaefer, Governmental Price Control, 35 Yale L. J. 438.

[15] *Missouri Pacific Railway* v. *Humes*, 115 U. S. 512 (1885); *People* v. *Illinois Central*, 235 Ill. 374 (1908); *Shepherd* v. *Buffalo, etc., R. Co.*, 35 N. Y. 641 (1866); *Sawyer* v. *Vermont, etc., Ry.*, 105 Mass. 196 (1870).

[16] *Detroit, etc., Railway Co.* v. *Osborne*, 189 U. S. 383 (1903).

[17] *New York, etc., R. Co.* v. *Bristol*, 151 U. S. 556 (1893).

riers may be compelled to purchase and install automatic bell ringers,[20] and a particular kind of headlight, even though this involves doing away with existing efficient lights and the expense of purchasing new ones.[21] The speed of its trains [22] and the places where stops must be made can be prescribed,[23] and such requirements may even extend to the re-arrangement of the schedule,[24] and the re-routing of trains.[25]

A carrier may be ordered to supply drinking cups to passengers[26] and to supply separate white and colored Pullman service,[27] and to furnish passenger service.[28] A carrier may be required to equip its cars in a certain way, such as for the hauling of lumber,[29] and to install a particular system of car heating or refrigeration[30] or interlocking devices at track crossings.[31] Carriers have been frequently required to expend their funds and to use their holdings in the building of spur tracks, or to supply switch-

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[20] *Pittsburg, etc., Railroad* v. *State*, 178 Ind. 498 (1912).

[21] *Atlantic Coast Line* v. *State*, 234 U. S. 280 (1914); *Vandalia Railroad Company* v. *Public Service Commission*, 242 U. S. 255 (1916).

[22] *Erb* v. *Morasch*, 177 U. S. 584 (1900).

[23] *Gladson* v. *Minnesota*, 166 U. S. 427 (1897); *Lake Shore, etc., Ry.* v. *Ohio*, 173 U. S. 285 (1899).

[24] *Atlantic Coast Line* v. *Commission*, 206 U. S. 1 (1907).

[25] *Lusk* v. *Commission*, 210 S. W. 72 (Mo.).

[26] *Detroit, etc., Railroad Co.* v. *Commission*, 83 N. J. L. 212 (1912).

[27] *Southern Railway* v. *Norton*, 112 Miss. 302 (1916).

[28] *C. & O. Railway* v. *Commission*, 242 U. S. 603 (1917); *Missouri Pacific* v. *Kansas*, 216 U. S. 262 (1910).

[29] *Lumber, etc., Co.* v. *Atlantic Coast Line*, 58 Fla. 292 (1909).

[30] *New York, etc., R.* v. *New York*, 165 U. S. 628 (1897).

[31] *Cincinnati, etc., Railway* v. *Railroad Commission*, 180 Ind. 243 (1913). See *Northern Pacific Railroad* v. *Puget Sound, etc., Railroad*, 250 U. S. 332 (1917), where the court stated:

> "It has long been settled law that the imposing of uncompensated damages involved in obeying a law passed in a reasonable exercise of the police power is not a taking of property without due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States. *Chicago, etc., R. R. Co.* v. *Nebraska*, 170 U. S. 57, 73, 74 (1898); *New Orleans, etc., Co.* v. *Commission*, 197 U. S. 453, 461, 462 (1904); *Northern Pacific, etc., Company* v. *Minnesota*, 208 U. S. 583, 594 (1907); *Chicago, etc., Railroad Company* v. *Tranbarger*, 238 U. S. 67, 76 (1915)."

ing service,[32] although it is certainly true, as the California Supreme Court has held, that "to compel a railroad company to apply its property to the construction and operation of a line of railroad which it does not decide to construct or operate is to take its property."[33]

A carrier can be required to erect a station,[34] and even if a carrier owns a site for a station on which it wishes to build, the state can require it to relocate its station upon some other site though such order involves much greater outlay.[35] A number of carriers entering the same town can be compelled to erect a union station or depot, even though they may have individual stations which they prefer to maintain.[37] A familiar imposition of affirmative obligation are the statutes which force the employment of a prescribed number of employes.[38]

The cases are numerous in which the state has compelled railroads or bridge companies to build viaducts and tunnels, and in some cases to change their location, in other cases to remove or rebuild them, where improvements, as of rivers, roads, or for drainage, make such construction outlay by the carrier seem necessary, all without special compensation.[39]

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[32] "Chicago, etc., *Railroad* v. Ochs, 249 U. S. 416 (1918); *Lake Erie and W. R.* v. *Commission*, 249 U. S. 422 (1918); *State* v. *Chicago, etc., Railroad*, 115 Minn. 51 (1911); *St. Louis, etc., Railroad* v. *State*, 99 Ark. 1 (1911); *State* v. *White Oak Railway*, 65 W. Va. 15 (1909); *Mo. Pac. Ry.* v. *Larabee Mills*, 211 U. S. 612 (1909). See also *Detroit, etc., Railroad* v. *Commission*, 240 U. S. 564 (1916).

[33] "*Atchison, T. & S. F. Ry.* v. *Commission*, 173 Cal. 577 (1916).

[34] "*Minneapolis, etc., R. R.* v. *Minnesota*, 193 U. S. 53 (1903).

[35] "*St. Louis, etc., Ry.* v. *Bellamy*, 113 Ark. 384 (1914).

[37] "*Gulf, etc., Railway* v. *State*, 167 S. W. 192 (Tex. Civ. A. 1914); *Railroad Commission* v. *Northern Alabama Railway*, 182 Ala. 357 (1913).

[38] "*Chicago, etc., R.* v. *Arkansas*, 219 U. S. 453 (1911).

[39] "*West Chicago Street Railway* v. *Illinois*, 201 U. S. 506 (1906); *Union Bridge Company* v. *U. S.*, 204 U. S. 364 (1907); *Monongahela Bridge Company* v. *United States*, 216 U. S. 177 (1910); *Hannibal Bridge Company* v. *U. S.*, 221 U. S. 194 (1911); *Chicago, etc., Railroad Company* v. *Nebraska*, 170 U. S. 57 (1898); *Northern Pacific Railroad Company* v. *Duluth*, 208 U. S. 583 (1908); *Cincinnati Railroad* v. *Conersville*, 218 U. S. 336 (1910); *Kansas City Railroad* v. *Drainage, etc.*, 223 U. S. 75 (1914); *Lake Shore, etc., Railroad* v. *Clough*, 242 U. S. 375 (1916); *Missouri Pacific Railroad* v. *Omaha*, 235 U. S. 121 (1914); *Chicago, etc., Railroad* v. *Illinois*, 200 U. S. 561 (1906).

Carriers have been compelled to perform certain affirmative acts upon their own rights of way, such as the destruction of weeds,[40] the construction of openings on the roadbed to take care of surface water,[41] and the sprinkling of streets occupied by the right of way.[42]

The right to withhold extending one's "own business" is one of the commonest and most valuable of property rights. But this right has been taken away by the state not only in some of the carrier cases cited above, but quite generally as to gas and water and telephone service companies, which have been compelled to extend their mains, add new exchanges, etc.[43]

Before the Carmack amendment to the Interstate Commerce Act (Sec. 20), one of the property rights of a carrier was the power to refuse to receive goods beyond its own line or over tracks of connecting carriers.[44] The Carmack amendment made the initial carrier liable for injuries anywhere en route even though the injury may have occurred on the line of some other carrier and through his negligence. This was upheld as not in violation of the Fifth Amendment.[45]

The Hepburn Act, commonly called the Commodities Clause of the Interstate Commerce Act, deprived the carriers of their property right to own articles carried by them, and to carry articles owned by them. This depriva-

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[40] *Chicago, etc., Railroad* v. *Anderson*, 242 U. S. 283 (1916).

[41] *Chicago, etc., Railroad* v. *Tranbarger*, 238 U. S. 67 (1915).

[42] *Pacific Gas and Electric Co.* v. *Police Court*, 251 U. S. 22 (1920).

[43] See: *New Orleans Gas Co.* v. *Commission*, 197 U. S. 453 (1905); *People* v. *McCall*, 245 U. S. 345 (1917); *Lukrawka* v. *Water Co.*, 169 Calif. 318; *Pocatello Water Co.* v. *Standley*, 7 Idaho 155 (1900); *Consumers Company* v. *Hatch*, 224 U. S. 148 (1912); *Mulbank* v. *Telephone Co.*, 159 N. W. 99 (S. Dak. 1916).

[44] *Farley* v. *Lavary*, 107 Ky. 523 (1900); *Myrick* v. *Michigan Central Railroad*, 107 U. S. 102 (1882); *Atchison, Topeka and Santa Fe Railroad Company* v. *Denver, etc., Railroad*, 110 U. S. 667 (1884); *Express Cases*, 117 U. S. 1 (1886).

[45] *Norfolk, etc., Railroad* v. *Dixie, etc., Company*, 228 U. S. 593 (1913); *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186 (1911); *Louisville, etc., Railroad* v. *Scott*, 219 U. S. 209 (1911).

tion of property of the carriers was held to be constitutional.[46] Regulations of the issuance of securities by carriers, which deprive them of their property right to borrow money as they see fit, have been upheld in many cases.[47] A state can deprive a carrier of its right to demand prepayment of freight from a connecting carrier.[48]

Taking away the right to exclude others.

"Property," wrote Mr. Justice Holmes, in *International News Service* v. *Associated Press*, 248 U. S. 215, at 246 (1918), "depends upon *exclusion* by law from interference." This right to exclude others is one of the most important of all the rights in the bundle; in fact, the idea of "private" property depends in large measure upon this right, for things owned in common with all the rest of the community are not "private" property, and our rights with reference to them are not property rights. This right to exclude has often been taken away by the Legislatures. Perhaps as drastic an instance to be found in any of the public utility cases depends not upon legislation, but upon a decree of the United States Supreme Court. In *United States* v. *Terminal Railroad Association*, 224 U. S. 383 (1912), the court stated at p. 405 that "it cannot be controverted that, in ordinary circumstances a number of independent companies might combine for the purpose of controlling or acquiring terminals for their common but exclusive use. In such cases other companies might be admitted on terms or excluded altogether." Nevertheless, the court decreed that the defendant association yield this valuable property right, and admit other future railroads to joint ownership and control of the St. Louis terminal.

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[46] *United States* v. *Delaware, etc., Co.*, 213 U. S. 366 (1909).
[47] *See Davis* v. *Watertown Bank*, 178 S. W. 592 (Tex. C. A.).
[48] *Wadley, etc., Railroad* v. *Georgia*, 235 U. S. 651 (1918).

The dissent of Mr. Justice McKenna in a recent case involving this property right in the case of a non-public-utility, a mine, is so frank, and so illuminates the *results* which the Supreme Court has reached in case after case, that it merits quotation:

> "Let me state the proposition of the opinion, denuded of the confusion of its words. It is that the owner of property,—a 'joint mine' (to use the designation of the case) having available to him the car facilities of two carriers, must yield his advantage or some of it to the owner of a 'local mine' * * * who is not so situated. * * *
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> The doctrine of the opinion is that the Interstate Commerce Commission, and this court, in sustaining it, can take from property an attribute,—almost as tangible an attribute as its physical substance,—that is, its position,—that which avails and makes wealth of its products. This, in my opinion, is a deprivation of property. * * *
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> Position of property is as much a constituent of its value as its composition. * * * Take them away or limit them, and you take away or limit its value —its right and exercise—its existence. * * * I repeat, that an owner of property is entitled in the exercise of his rights and satisfaction of his needs, to demand service of the carriers to which he has relation according to his rights and needs, and in the order of their requisition and the ability of the carrier."[49]

In *Louisville, etc., Railroad* v. *U. S.*, 238 U. S. 1 (1915), carrier A and carrier B, which had been furnishing switching service to each other, were required by the Interstate Commerce Commission to use their facilities in behalf of rival carrier C, in the same manner as in behalf of each other. This cutting down of a carrier property right to exclude others was held constitutional.[50] There have been a large number of similar cases in which this same property

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[49] *United States* v. *New River Co.*, 265 U. S. 533, 543, 544 (1924).

[50] See also *Louisville, etc., Railroad* v. *U. S.*, 242 U. S. 60 (1916).

right has been taken away or pared down by requiring carriers to receive and transport the cars of competing carriers upon its tracks and terminals, and like requirements.[51]

REAL PROPERTY CASES.

Property rights in real estate, in the legal as well as the popular mind, have stability and permanence, and yet they have been cut down in recent years in myriad ways, and these deprivations of property rights without compensation have been upheld as constitutional by the courts. A frank statement of what has been going on is to be found in the opinion of the court in the Rent Law Cases, 256 U. S. 135 (1920), delivered by Mr. Justice Holmes:

> "The fact that tangible property is also physical tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed, but the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down and to that extent taken without pay. Under the police power the right to erect buildings in a certain quarter of the city may be limited to from 80 to 100 feet. *Welch* v. *Swasey*, 214 U. S. 91. Safe pillars may be required in coal mines. *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531. Bill boards in cities may be registered. *St. Louis Poster Co.* v. *St. Louis*, 249 U. S. 269. Water sheds in the country may be kept clear. *Perley* v. *North Carolina*, 249 U. S. 511. These cases are enough to establish that a *public exigency will justify the Legislature in restricting property rights in land to a certain extent without compensation.*" Pp. 155, 156.

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[51] See *Grand Trunk Company* v. *Commission*, 231 U. S. 457 (1913); *Chicago, etc., Railway* v. *Iowa*, 233 U. S. 334 (1914); *Chicago, etc., Railroad* v. *Commission*, 175 Ind. 630 (1911); *Commission* v. *Michigan Central Railroad*, 236 U. S. 615 (1915).

Deprivation of rights in real estate have been chiefly of three kinds:

(1) Deprivations of rights of *use*.

(2) Deprivation of the right *to exclude others*.

(3) Deprivation of *all* property rights whatsoever in the land.

Taking Away the Property Right to Use

Deprivation of the right freely to use one's land has been the most common in the dense overgrowth of recent legislation. Probably the most remarkable illustrations are afforded by the rent laws of the District of Columbia and New York State. These statutes deprive landlords of a number of rights, not the least of which is the right to charge what price they please for the use of their land and to have such use as they please made of their own realty. Such legislation was upheld (as emergency measures) in *Holding Company* v. *Feldman*, 256 U. S. 170 (1920), and *Block* v. *Hirsch*, 256 U. S. 135 (1920). The effect of this legislation upon property rights is thus described by the four dissenting judges:

> "We do see that the effect and evil of the statute is that it *withdraws the dominion of property* from its owner * * *." P. 161.

A similar description of the laws' effects was given in the majority opinion by Mr. Justice Holmes in the quotation just made from the same case, pp. 155-156.

Legislative acts regulating the use of land, by depriving the owner of his right to use the fruits of the land in any manner he pleases, are common, and have been invariably upheld. Perhaps the most interesting illustration is offered by *Townsend* v. *State*, 147 Ind. 624 (1897). There the defendant had on his land a natural gas well. For his own diversion he attached what is known as a "flambeau light" to the well and permitted it to burn constantly, a practice

which became so common that the Legislature declared that the use of natural gas even though privately owned, for such illumniating purposes was so wasteful and extravagant that it should be thereafter illegal. The statute was upheld as constitutional.[52] Variations on this typical situation have been numerous. A statute forbidding the drawing of natural mineral water from wells on one's own property in excessive quantities was upheld.[53] Similar statutes regulating the use of artesian wells have been upheld.[54]

It has been common for the Legislatures to deprive mine owners of their right to use their mines as they see fit. Typical statutes of this type, which have been sustained by the United States Supreme Court against claims that they violate constitutional rights, are those requiring mine owners to leave a pillar of coal in each seam worked by them, thus leaving a portion of the valuable contents of the mine unworked. Also statutes requiring entries of a certain width.[55]

Zoning and Bill-Board Cases

Legislation establishing zones in which land owners may not erect certain kinds of structures, or use their buildings for certain purposes—a very familiar legal and social phenomenon in recent years—is an excellent illustration of the power of the state to take away the most fundamental rights of property in land, without compensation, and yet without violation of the Constitution. Such legislation takes away the primary right to use land in the manner deemed wise or most profitable by the owner. In one of the earliest

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[52] See also *Commonwealth* v. *Trent*, 117 Ky. 34 (1903); and numerous cases collected in 23 L. R. A. (N. S.) 436 and 4 Ann. Cas. 357.

[53] *Lindsey* v. *Carbonic Gas Company*, 220 U. S. 61 (1911). See also *Hathorn* v. *Natural Carbonic Gas Co.*, 194 N. Y. 326 (1909).

[54] See *Eccles* v. *Dillo*, 22 N. Mex. 235 (1917); *Ex Parte Elam*, 6 Calif. App. 233 (1907).

[55] *Plymouth Coal Co.* v. *Commonwealth*, 232 U. S. 531 (1914); *Barrett* v. *Ind.*, 229 U. S. 26 (1913).

building restriction cases, *St. Louis* v. *Hill*, 116 Mo. 527 (1893), the court (per Sherwood, J.) described the effect of such restrictions as follows:

> "The day before the ordinance went into operation, defendant had the unquestioned right to build at will on his lot; the day afterward, he was as effectually prevented from building on the 40 feet strip, * * * as if the city had built a wall around it."

The learned justice then stated that "if this is not a taking" of property it was difficult to imagine one.

The Supreme Court of the United States in *Welch* v. *Swasey*, 214 U. S. 91 (1909), sustained a deprivation of an owner's right to build as high a building as he pleased, a property right in the free use of one's land which in many cases is of the very greatest value. A comprehensive zoning ordinance was sustained by the Supreme Court in *Village of Euclid* v. *Amber Realty Co.*, 272 U. S. 365. Statutes throughout the United States having similar purposes and like effects upon the property rights of land owners have been upheld in a large number of cases.[56]

Another interesting form of deprivation of property rights by regulation of the use of land is to be found in the numerous Bill-Board cases. These enactments either determine that in certain zones no owner of property shall be permitted to use his land for the erection of bill boards, or they limit the erection of bill boards to a certain size,

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[56] *Miller* v. *Board of Public Works*, 234 Pac. 381 Calif. (1925); *Zahn* v. *Board of Public Works*, 234 Pac. 388 Calif. (1925); *Schwartz* v. *Bronlow*, 50 D. C. App. 279 (1921); *Des Moines* v. *Oil Company*, 193 Ia. 1096 (1922); *Ware* v. *Wichita*, 113 Kan. 153 (1923); *West* v. *Wichita*, 234 Pac. 978, Kan. (1925); *State ex rel. Hayes* v. *New Orleans*, 154 La. 289 (1923); *Cochran* v. *Preston*, 108 Md. 220 (1908); Opinion of the Justices, 234 Mass. 597 (1920); *Brett* v. *Commissioner*, 145 N. E. 269 (Mass. 1924); *Clements* v. *McCabe*, 210 Mich. 207 (1920); *Lincoln Trust Co.* v. *Williams*, 229 N. Y. 313 (1920); *Ohio ex rel.* v. *Osborne*, 22 Oh. N. P. (N. S.) 549 (1920); *Kahn Bros.* v. *Youngstown*, 25 Oh. N. P. (N. S.) 31 (1924). See also Bettman, Constitutionality of Zoning, 37 Harvard Law Rev. 834; Baker, Constitutionality of Zoning Laws, 20 Ill. Law Rev. 213; Chandler, The Attitude of the Law Toward Beauty, 8 Journal A. B. A. 470, 474 (1922).

shape, etc.[57] A statute of Massachusetts (Gen. Laws Ch. 93, (1921), Secs. 29-33), forbids bill-boards on land 300 feet from parks and near places of unusual scenic beauty and even goes so far as to regulate the *subject matter* displayed on the bill-board!

Similar restrictions upon the use of the buildings themselves are the common anti-smoke ordinances which have been quite uniformly upheld.[58] Regulations having similar purposes, requiring furnaces to be constructed in a certain way or prohibiting the burning of soft coal upon the premises have been upheld.[59]

Another common manner in which the Legislatures have regulated the use of buildings is the imposition of a duty to equip buildings with fire escapes, certain types of plumbing, etc., etc.[60]

Taking Away the Property Right to Conduct Certain Activities on the Land

Perhaps the most inclusive type of regulation of the use of real estate with the consequent deprivation of that property right, is the regulation of what activities may be carried on upon certain land. Upon this subject there have been countless statutes and ordinances, and they have been

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[57] *See In re Wilshire*, 163 Fed. 620 (1908 Cal.); *Rochester v. West*, 164 N. Y. 510 (1900); *Filbeck v. Buffalo*, 118 Fed. 773 (1902 W. D. N. Y.); *St. Louis Advertising Co. v. St. Louis*, 235 Mo. 99 (1911); *Kansas City Advertising Co. v. Kansas City*, 240 Mo. 659 (1911); *Ex Parte Savage*, 63 Tex. Cr. R. 285 (1911); *Horton v. Old Colony Co.*, 36 R. I. 507 (1914); *State v. Staples*, 167 N. C. 637 (1911); *Cusack v. Chicago*, 267 Ill. 344 (1915), aff'd. 242 U. S. 526 (1917).

[58] *See Atlantic City v. Prance*, 230 Pa. 86 (1908); *Bowers v. Indianapolis*, 169 Ind. 105 (1907); *Glucose Refining Co. v. Chicago*, 138 Fed. 209 (1905) (N. D. Ill.); McQuillan, "Abatement of the Smoke Nuisance in Large Cities," 46 Cent. L. J. 147.

[59] *Department of Health v. Brewing Co.*, 78 N. Y. Supp. 11 (1902); *Brooklyn v. Electric Railroad Company*, 44 N. Y. App. Div. 462 (1899).

[60] *See e. g. Tenement House Department v. Moeschen*, 179 N. Y. 325 (1904); *Commonwealth v. Roberts*, 155 Mass. 281.

generally upheld. So, a city may prohibit the location upon certain land, of garages[61], livery stables[62], and dairies[63], or even the keeping of a cow upon the land[64]. The land may not be used for the storing of gasoline or petroleum, even if that is its most valuable use to the owner, and even if originally the owner bought the land and moved his gasoline there at the request of the city which later legislated against him[65].

The owner of land may be prohibited from making brick upon his land even if the land contains valuable brick material deposits which can only be profitably manufactured upon the premises.[66] It has been common for owners to be required to remove snow from their own sidewalks and premises and such requirements have been upheld.[67] Even where a cemetery association owns land which under its charter, it can use only for a burying ground, nevertheless, it may be prohibited from using the land for that purpose.[68]

Taking Away Property Rights by the Legalizing of Nuisances

It is quite clear that various forms of nuisances, such as smoke, cinders, the flooding of adjoining property, vibration, noxious odors, etc., involve very definite taking of property rights. If done by individuals or the state the owner is commonly entitled to compensatory damages or

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[61] *In re McIntosh*, 211 N. Y. 265 (1914).

[62] *Reinman v. Little Rock*, 237 U. S. 171 (1915).

[63] *New Orleans v. Gilfoy*, 147 La. 1089 (1920).

[64] *Davis v. Savannah*, 147 Ga. 605 (1918).

[65] *Pierce Oil Corporation v. Hope*, 248 U. S. (1919). See also note in 52 L. R. A. (N. S.) 931.

[66] *Hadacheck v. Sebastian*, 239 U. S. 394 (1915).

[67] See *Kansas City v. Hoomes*, 274 Mo. 159 (1918), and cases collected quoted in L. R. A. (1918), D. 1016.

[68] *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358 (1910).

an injunction, to pay for or to prevent the taking of such rights. If the Legislature can *legalize* such a deprivation of property rights, it then takes from the land owner, whose property rights the nuisances invaded, some of those property rights. A series of cases in the Massachusetts Supreme Court illustrate this situation very neatly and contain very frank recognition of the process. In *Davis* v. *Sawyer*, 133 Mass. 289 (1882), the court upheld the enjoining as a nuisance of the ringing of a huge factory bell by the defendants at a very early hour, because such ringing invaded the property rights of quiet enjoyment of adjoining property holders. Subsequently, the Legislature specifically authorized such bell ringing, thus legalizing the invasion of property rights enjoined in the Davis case. In other words, the Legislature took away the property right of quiet enjoyment, upheld in the Davis case. The validity of this statute the Supreme Court upheld in *Sawyer* v. *Davis*, 136 Mass. 239 (1884). The opinion of Mr. Justice Allen presents a frank and realistic statement of the power of the Legislature to diminish property rights:

> "Nothing is better established," wrote the learned justice, "than the power of the Legislature to make what are called police regulations, declaring in what manner property shall be used and enjoyed, and business carried on, with a view to the good order and benefit of the community, even though they may to some extent interfere with the full enjoyment of private property, and although no compensation is given to a person so inconvenienced. *Bancroft* v. *Cambridge*, 126 Mass. 438, 441. The privilege of continuing in the passive enjoyment of one's own property, in the same manner as formerly, is subject to limitation. • • • It is then urged that the Legislature cannot legalize a nuisance, and cannot take away the rights of the defendants as they have been ascertained and declared by this court. • • • *But the Legislature* • • • ***may declare for the future, in what manner a man may use his property.*** • • • The fact that the rights of citizens as previously existing are changed is a re-

sult which always happens; *it is indeed in order to change those rights that the police power is exercised.*"[69] P. 240 *et seq.*

Fencing statutes as limitations of property rights

Statutes regulating the height of fences which a man may erect upon his own land, so-called "spite fences", are an illustration of the state's power to diminish property rights. The situation is well put by Mr. Justice Holmes in *Ridout* v. *Knox*, 148 Mass. 368 (1889), at 372:

> "At common law a man has a right to build a fence on his own land as high as he pleases, however much it may obstruct his neighbor's light and air, and the limit up to which a man may impair his neighbor's enjoyment is fixed by external standards only. [Citing cases.]
>
> "But it is plain that the right to use one's own property for the sole purpose of injuring others is not one of the immediate rights of ownership; it is not a right for the sake of which property is recognized by the law, but it is only a more or less necessary incident of rights which are established for very different ends."

It was therefore held that the owner's common law property right to build his fence as high as he saw fit could be taken away constitutionally and without compensation.[70]

Statutes imposing an affirmative duty upon adjoining owners to erect fences have existed from early colonial times,[71] and statutes imposing such a duty have been universally upheld.[72] An interesting variation upon such stat-

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[69] For similar cases, see *Commonwealth* v. *Parks*, 155 Mass. 531 (1892); *Murtha* v. *Lovewell*, 166 Mass. 291 (1896), and *Levis* v. *Goodwin*, 191 Mass. 341 (1906). See the following references on this interesting problem: 5 A. L. R. 1474; 22 A. L. R. 542; 71 U. of Pennsylvania, L. R. 91; 18 American Law Rev. 599; 8 Ill. L. Rev. 19; 7 Cornell L. Q. 61; 25 A. L. R. 1245; Ann. Cas. 1914 A. 434; 8 Cornell L. Q. 371; 32 Yale L. J. 833; 51 L. R. A. 657; 10 A. L. R. 1589; 12 A. L. R. 431; 19 A. L. R. 1395; 9 Harvard L. R. 521; 24 Harvard L. R. 298; Holland, Jurisprudence, 11th ed., p. 206 ff.

[70] See also *Horan* v. *Byrnes*, 72 N. H. 93 (1903).

[71] See III New Hampshire Province Papers, 176.

[72] See 11 Ruling Case Law, p. 883, Sec. 16.

utes is the Illinois statute requiring that fences be assigned. In *Hill* v. *Tohill*, 225 Ill. 384 (1907), it was held that the statute did not unconstitutionally deprive a land owner of his property where it required the assignment of a hedge fence planted by the complainant's predecessor in title before the enactment of the statute.

Taking away the right to exclude others from the land

The second great property right with reference to the land is the right to exclude others, one of the principal rights of dominion. This right, too, has been frequently taken from land owners by the state, in a great variety of ways. For example, in *Wurtz* v. *Hoagland*, 114 U. S. 606 (1885), drainage works were placed upon an owner's land without compensation and the legislation authorizing it was upheld. In *Bent* v. *Emery*, 173 Mass. 495 (1899), harbor commissioners of South Bay, Boston, acting under legislative authority, dredged certain flats belonging to the plaintiff, the effect of which was to flood the plaintiff's land; there was no provision for compensation. The court refused to enjoin the harbor commissioners and upheld the legislation.

A state may even proceed upon a man's land and build a levee upon it without compensating him, thus seriously cutting down his property rights and taking away his right to exclude, as in *Eldridge* v. *Trezevant*, 160 U. S. 452 (1896). The following comment upon the Eldridge Case appears in *Otis Company* v. *Ludlow Company*, 201 U. S. 140 (1906), at 154:

> "Even the incident of ownership may be cut down by the laws and usages of a state. *Eldridge* v. *Trezevant*, 160 U. S. 452, 466."

Another similar case is *Lewis, etc., Company* v. *Briggs*, 229 U. S. 82 (1913), where the complainant owned land at the

bottom of a bay, which had been used for many years for the cultivation of oysters. It sought to restrain the defendant state officials from dredging the bed of the bay at this point with the inevitable result of invading the complainant's property and destroying it for its most valuable use. The United States Supreme Court, however, upheld the state authorities.

A telling illustration of the taking away of the right to exclude others from the occupation and use of one's land is the common party wall statute. These enactments give A a property right in the land of his adjoining neighbor B, and take away from B the right to exclude A from entering on B's land for the purpose of erecting a wall, and B's right to use that part of his land on which the statute authorizes A to build his wall. B cannot defeat A's right, nor exercise the land owner's usual right to exclude by building on his entire lot either to the line or a short distance from it.[72a] The constitutionality of these deprivations of property rights has been sustained in all parts of the country.[72b]

The doctrine of adverse possession is an excellent illustration of the power of the state to deprive an owner of his right to exclude others from his possessions. This doctrine which originates in the statute of 21 Jac. I Ch. 16 (1624), simply provides that if A enters upon and lives under certain circumstances upon B's land in violation of B's property rights, for a period of years, the state will withdraw from B his property right to exclude A from his land. Such statutes and other statutes of limitation with reference to land have been upheld as constitutional.[73]

[72a] *Herron* v. *Houston*, 217 Pa. St. 1.

[72b] See *Swift* v. *Calnan*, 102 Ia. 206 (1897); *Lederer* v. *Colonial Investment Co.*, 130 Ia. 157 (1906); *Fowler* v. *Koehler*, 43 App. Cas. (D. C.) 349.

[73] See *Montoya* v. *Gonzales*, 232 U. S. 375 (1914) and *Wheeler* v. *Jackson*, 137 U. S. 245 (1890). For a case in which an analogous statute was upheld see *Kentucky Union Co.* v. *Commission*, 219 U. S. 140 (1911).

Taking away all property rights in real estate

Certain property rights in land, it has been seen, can be taken by the state without compensation and without violation of the Constitution. But not only may the state diminish the number of rights existing in land in real estate; it may destroy *all* of them by simply destroying part of the realty itself—that is, those objects raised upon land and considered by the law of real property as being themselves realty. For example, the state may order the destruction without compensation of orange trees,[74] or of red cedars.[75]

It is an ancient principle of the law that the state or even volunteers, may destroy houses in the path of a fire, if necessary to save other property, and there are numerous present-day cases upholding the power of the state to authorize the removal, repair or destruction of buildings by fire marshals.[76]

The power of the state to change the tenure and disposition of land, to take "title" (*i. e.*, all property rights over certain land) from A and vest it in B, is another illustration of a process which goes on about us daily. "The power of the state," the Supreme Court held in *United States* v. *Fox*, 94 U. S. 315 (1876), at 320, "to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which testamentary disposition of it may be exercised by its owners, is undoubted."[77]

Property rights in land are being constantly destroyed by the state under the familiar Torrens system. Persons

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[74] *Board of Agriculture* v. *Tangeman*, 140 La. 756 (1917).

[75] *Bohn* v. *State Entomologists*, 105 S. E. 141 (Va. 1920), and for similar cases, see *Stockwell* v. *State*, 203 S. W. 109 (1918 Tex. Civ. App.); *Carstens* v. *De Selles*, 82 Wash. 643.

[76] See for examples, *Runge* v. *Gleeson*, 37 N. D. 618 (1917), and *Jackson* v. *Bell*, 143 Tenn. 452 (1920).

[77] See also 3 Washburn, Real Property, 4th ed., p. 187; Tiedeman, Real Property, 2d ed., sec. 19.

holding the fee, or some lesser estate, or having some valid claim to the bundle of rights in land called "title", in many cases without actual notice or knowledge whatsoever, may have such rights extinguished irrevocably by the decree of a Chancery Court under the Torrens system. And yet such statutes have been upheld throughout the country.[78] Similar statutes, providing for the extinction of the rights of unknown claimants, including those who are not even served or notified, have been upheld by the United States Supreme Court.[79]

It is constitutional for a state to forbid a corporation to continue to exercise property rights over realty, except for certain purposes, longer than five years, after which time, if it still holds title, all the property rights, that is, the "title", escheats to the state.[80] A similar result can be effected as to individuals.[81]

In *Glory* v. *Butts*, 84 W. Va. 348 (1919), a statute was upheld which provided for the sale or lease of lands subject to contingent remainders of persons unborn, where all persons in being having any interest, vested, contingent or expectant, were made parties, although the effect of the act was to deprive unborn remaindermen of property rights which without statute, would have existed and which are recognized generally throughout real property law.

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[78] See, e. g., *Crowell* v. *Aiken*, 108 S. E. 791 (1921 Ga.); *Saunder* v. *Stockman*, 108 S. E. 797 (Ga. 1921); *People* v. *Simon*, 176 Ill. 165 (1898); *Robinson* v. *Kerrigan*, 151 Calif. 40 (1907); *People* v. *Crissman*, 41 Colo. 450 (1907); *Tyler* v. *Judges*, 175 Mass. 71 (1900); *State* v. *Westfall*, 85 Minn. 437 (1902); *Ashton Co.* v. *Brumel*, 56 Utah 587 (1920).

[79] *American Land Co.* v. *Zeiss*, 219 U. S. 47 (1911); *Hamilton* v. *Brown*, 161 U. S. 256 (1896).

[80] *German Ins. Company* v. *Commonwealth*, 141 Ky. 606 (1911).

[81] *In re Alton's Estate*, 220 Pa. 258 (1908); *Christianson* v. *King County*, 239 U. S. 356 (1915).

MISCELLANEOUS CASES.

(*Chattels*)

The same cutting down of property rights which, as we have pointed out, goes on in the field of public utilities and in the field of real estate, runs all through the legislation and supporting decisions in the field of chattel property rights. Here too the instances of the taking away or paring down of sticks in the bundle of rights are so multitudinous that we are presenting simply the more interesting and more obvious ones.

A worker's property right in wages earned may be limited or taken away in a variety of fashions, probably the most interesting of which are the limitations upon his right to spend his wages, by statutes restricting assignment. In *Mutual Loan Company* v. *Martell*, 222 U. S. 225 (1911), a statute prevented the assignment of wages unless the worker-assignor had obtained the consent of his wife and his employer, in writing. This limitation upon the property right both of the wage-earner and his assignee was sustained.[82]

Absentee Estate Settlement Statutes and like Instances

The power of the state to take over a citizen's estate when he has been absent and unheard of for a period of years is one of the most drastic illustrations of the power to take away property rights, in this case all property rights. Such so-called absentee estate settlement statutes have been generally upheld.[83]

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[82] An illuminating case of similar type is *Wight* v. *Baltimore, etc., Company*, 125 Atl. 881 (Md., 1924), commented upon in 34 YALE LAW JOURNAL, 202.

[83] *Bliss* v. *Nelson*, 222 U. S. 1 (1911); *Bank* v. *Weeks*, 110 Md. 703 (1908); *Bickford* v. *Steward*, 55 Wash. 278 (1910).

A corollary to this power is the limitation which appears in a great variety of statutes upon the ancient property right to direct the disposition of one's possessions after death. Of the power of the state to pare down this right, it was said by Mr. Justice Brown in *United States* v. *Perkins*, 163 U. S. 625 (1896) at 628:

> "Though the general consent of the most enlightened nations, from the earliest historical period, recognized a natural right in children to inherit the property of their parents, we know of no legal principles to prevent the Legislature from taking away or limiting the right of testamentary disposition or imposing such conditions upon its exercise as it may deem conducive to public good."

The property right of a minor to dispose of his property may be taken away from him and given to a court and its curator, who may sell the estate.[54]

That the Legislature has full control over the property rights of an heir has been established by a large number of cases in many fields.[55]

And a statute authorizing the appointment of a committee to exercise full authority over all an individual's property rights, where he has been adjudged incompetent, has been sustained.[56]

Bank Cases

Funds left with banks in savings accounts for a period of years without being demanded, are, under quite common statute, payable to the state or to a state appointed receiver. Such legislation of course not only takes away the property rights of the real owner or his heirs, but

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[54] *Whitlesey* v. *Conniff*, 266 Mo. 567 (1916).

[55] *See, e. g., McCaughey* v. *Lyall*, 224 U. S. 558 (1912); *In re Barnes Estate*, 203 Pac. 100 (Calif. 1922).

[56] *Chaloner* v. *Sherman*, 242 U. S. 455 (1916).

deprives the bank holding the deposits of the benefits of continuing to hold them. Such legislation has been upheld.[87]

Another manner in which property rights of a bank have been taken is to be found in the leading case of *Noble State Bank* v. *Haskell*, 219 U. S. 575 (1911), in which a statute provided for an assessment upon solvent banks to create a guarantee fund protecting depositors against losses.[88] And a safe deposit company may be required to prevent the removal of the contents of a safe deposit box after the death of the renter, unless sufficient funds are retained by it to pay the renter's inheritance tax.[89]

Taking away the right to give away chattels

An interesting illustration of the power of the Legislatures to take away rights of property is to be found in the common statutes and ordinances making it illegal for the owner of a street-car transfer ticket to give it away. These enactments have been upheld almost without exception and the constitutional objections met. In *Ex parte Lorenzen*, 128 Cal. 431 (1900) the court stated at p. 437:

> "It is here insisted by petitioner that the transfer issued to him is his property, and that an essential and inalienable right to the enjoyment of property is the right to sell, give it away or otherwise dispose of it. This however, is but partially true. A man may not be deprived of his property or his property rights for any private consideration whatever, nor for considerations of public good, without compensation first made; but *the legislature has the unquestioned right, and every day exercises it, of restricting the use to which private property may be put.*"[90]

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[87] *Provident Institution, etc.*, v. *Malone*, 221 U. S. 660 (1911); *Commonwealth* v. *Savings Bank*, 259 Pa. 138 (1917).

[88] See also *Abilene National Bank* v. *Dolley*, 228 U. S. 1 (1913).

[89] *National Safe Deposit Company* v. *Stead*, 232 U. S. 58 (1914).

[90] See also *Chicago* v. *Openheim*, 229 Ill. 313 (1907); *State* v. *Corbett*, 59 N. W. 477.

A similar legislative deprivation of the right to give away one's "property" is found in ordinances forbidding the giving away or sale of garbage.[91]

The property right to control a public clock was taken away by a "day-light savings" statute, penalizing the setting of such a clock at any other than the "day-light savings" time; the statute was upheld.[92]

The property rights of the owners and exhibitors of moving pictures have been taken by regulation, censoring their output, requiring that the theatres be closed on Sunday, etc., and such regulations have been upheld.[94]

Deprivation of Manufacturers' Property Rights

A common form of limiting property rights is the type of statute which requires manufacturers to prepare their products in a certain way or force them to put into their products certain kinds of materials. For example, ice cream manufacturers may be required to prepare only ice cream containing not less than a fixed per cent of butter fat,[95] and the makers of lard may be forbidden to sell their products in bulk, and that sold in pails must be sold in pails of specified size.[96] Bakers may be required to make their bread in a certain standard loaf and with a specified label,[97] and the makers of syrup and molasses may not sell them as a mixture without a specified label.[98] Similar re-

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[91] See *Rochester* v. *Gutherlett*, 211 N. Y. 309 (1914); *Smith* v. *Spokane*, 55 Wash. 219; *Ex Parte Howell*, 158 S. W. 535 (Tex. Cr. App.); *Pantlind* v. *Grand Rapids*, 177 N. W. 303 (*Mich.*, 1920); *Urback* v. *Omaha*, 163 N. W. 307 (Neb. 1917).

[92] *State* v. *Bossett*, 123 Atl. 842 (Conn., 1924).

[94] See, *e. g.*, *Mutual Film Corporation* v. *Chicago*, 224 Fed. 101, C. C. A. 6th (1915); *Bogalusa* v. *Blanchard*, 141 La. 33 (1917); *Ex Parte Johnson*, 201 Pac. 533 (1921).

[95] *Hutchinson Ice Cream Co.* v. *Iowa*, 242 U. S. 153 (1916).

[96] *Armour & Co.* v. *North Dakota*, 240 U. S. 510 (1916).

[97] *Schmidinger* v. *Chicago*, 226 U. S. 578 (1913).

[98] *McDermitt* v. *State*, 228 U. S. 115 (1913).

strictions are placed upon the makers of commercial feeds, fresh and condensed milk producers, and the makers of butter.[99]

Another familiar class of statutes are those imposing a duty upon employers with reference to their employees, and which deprive them of property rights theretofore enjoyed, just as the foregoing statutes deprive them of rights with reference to commodities made. These statutes are of countless kinds: they limit the number of hours of labor which the employer can require in his business,[100] and the manner in which he must pay his employees;[101] they require him to furnish a discharged or resigning employee with a service-letter;[102] they require the installation of various types of safety devices, etc.[103] One of the most drastic forms of such legislation is the now familiar Workmen's Compensation Law, which imposes an absolute liability upon the employer for injuries suffered by an employee, regardless of the fault or absence of fault of the employer or his agents, and often in spite of the negligence of the injured man himself. Although at first the deprivation of property involved in these acts was held unconstitutional,[104] they are now everywhere upheld.[105]

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[99] *Fisher, etc., Co. v. Brown*, 187 Pac. 399 (Wash., 1920); *Creaghan v. Baltimore*, 104 Atl. 180 (Md., 1918); *Hebe Company v. Shaw*, 248 U. S. 297 (1918); *Nolan v. Jones*, 106 Pa. 235 (1919).

[100] *Holden v. Hardy*, 169 U. S. 366 (1898); *Muller v. Oregon*, 208 U. S. 412 (1908); *Baltimore & Ohio R. v. Interstate Commerce Commission*, 221 U. S. 612 (1911); *Bunting v. Oregon*, 243 U. S. 426 (1916).

[101] *Erie Railroad v. Williams*, 233 U. S. 685 (1914); *New York Central R. v. Williams*, 199 N. Y. 108 (1910); see also *Keokee Coke Co. v. Taylor*, 234 U. S. 224 (1914); *St. Louis, etc., Ry. Co. v. Paul*, 173 U. S. 404 (1899); *Knoxville Iron Co. v. Harbison*, 183 U. S. 13 (1901); *Reid, etc., Co. v. Commission*, 236 U. S. 338 (1915).

[102] *Prudential Insurance Co. v. Check*, 259 U. S. 530 (1922).

[103] *Bowersock v. Smith*, 243 U. S. 29 (1917); *Chicago, etc., Co. v. Proley*, 228 U. S. 680 (1913).

[104] *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271 (1911); Cf. *Jensen v. Southern Pacific*, 215 N. Y. 514 (1915).

[105] *Jeffrey Co. v. Blagg*, 235 U. S. 571 (1915); *Second Employers Liability Cases*, 223 U. S. 1, 47-53 (1912); *New York Central R. v. White*, 243 U. S. 188 (1917); *Hunter v. Colfax Coal Co.*, 175 Ia. 245; *Rhode v. Lime Co.*, 93 Kans. 257; *Opinion of Justices*, 209 Mass. 607; *State v. Creamer*, 85 Oh. St. 349; *Borgnis v. Falk*, 147 Wis. 327.

Liquor prohibition laws

One of the most remarkable demonstrations of the complete power of the state to deprive owners of some or all of their property rights in their possessions without compensation and without violation of the constitutional protection to property rights, is to be found in the legislation prohibiting the manufacture, sale, use, and possession, of intoxicating liquors. The effect of such laws has been to wipe out millions of dollars worth of property in breweries and saloons, in good will, in the beverages themselves, etc., etc. Such laws have been universally upheld not only by the states,[106] but in the United States Supreme Court.[107] Even where a brewing company has been given a charter by the state to operate and exercise its property rights, under express sanction of the state, prohibition laws making such sanctioned operation illegal have been upheld against the charge of unconstitutional deprivation of property rights.[108]

Deprivation of the property rights of traders

Property rights of those engaged in the usual business pursuits of selling, buying, loaning, borrowing, and kindred activities, have been taken away by innumerable statutes, as well as by decisions of the courts changing the common law. We shall not here enter upon a discussion of these

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[106] See, *Comm. v. Blackington*, 24 Pick (Mass.) 352 (1837); *Fisher v. McGirr*, 1 Gray (Mass.) 1 (1854); *Comm. v. Clapp*, 5 Gray 97 (1855); *State v. Clark*, 28 N. H. 176 (1854); *State v. Wheeler*, 25 Conn. 290 (1856); *Lincoln v. Smith*, 27 Vt. 328 (1855); *State v. Keenan*, 5 R. I. 492 (1858); *State v. Paul*, 5 R. I. 185 (1858); *People v. Gallagher*, 4 Mich. 244 (1856).

[107] *Mugler v. Kan.*, 123 U. S. 623 (1887); *Kidd v. Pearson*, 128 U. S. 1 (1888); *Clark Distilling Co. v. Western Md. Railroad*, 242 U. S. 311 (1917); *Rippey v. Texas*, 193 U. S. 504 (1904); *Purity Extract Co. v. Lynch*, 226 U. S. 192 (1912).

[108] See *Schmitt v. Cook Brewing Co.*, 120 N. E. 19 (Ind., 1918); *State v. Intoxicating Liquors*, 172 Pac. 1050 (Utah, 1918).

decisions, but will merely point out a few of the more obvious statutory deprivations.

The common Bulk Sales Acts, enacted in a majority of our states, generally provide that whenever the owner of chattels whose business is to sell at retail intends to sell or assign a part of his stock in trade, he must first cause notice of such intention to be given, usually by publicly recording a description of the property he thus intends to dispose of. (See *e. g.* Acts Conn. 1903, ch. 92.) Here is a burden placed upon the right to dispose which is novel, and which pares down that essential right materially. And yet such statutes have been upheld in the United States Supreme Court and the courts of the states.[109]

The so-called Blue Sky Laws are a further illustration drawn from very recent legislation. Generally speaking, these enactments take from the promoters of securities the right freely to dispose of them; in the case of security sellers refused a license by the administrative officer named under such acts, the right to sell (without which in this business few essential rights remain) is entirely taken away. As Mr. Justice McKenna stated, writing for the court in *Hall* v. *Geiger-Jones*, 242 U. S. 539 (1916) at p. 549:

> "The statute is a restraint upon the disposition of certain property. * * *"

And yet the Supreme Court in the Hall case had little difficulty in sustaining such laws against a most vigorous attack.[110]

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[109] *Lemieux* v. *Young*, 211 U. S. 489 (1908); *Kline* v. *Maroccos*, 219 N. Y. 383 (1916); *Gazette* v. *Iola Co-operative Co.*, 164 Wis. 406 (1916); *Marlow* v. *Ringer*, 91 S. E. 286 (1917); *Squire & Co.* v. *Tellier*, 185 Mass. 18; *Walp* v. *Moser*, 76 Conn. 515; *Neas* v. *Borches*, 109 Tenn. 398; *McDaniels* v. *Connelly Shoe Co.*, 30 Wash. 549.

[110] See also *Caldwell* v. *Sioux Falls, etc., Co.*, 242 U. S. 559 (1917); *Merrick* v. *Halsey & Co.*, 242 U. S. 568 (1917); *Stewart* v. *Brady*, 300 Ill. 425 (1922).

Statutes regulating loans on chattel mortgage security have been sustained,[111] as well as Loan Shark Acts. In *People* v. *Stokes*, 281 Ill. 159 (1917) the court stated, at p. 165:

> "The right of the State to regulate the rate of interest which may be charged for the loan of money is too firmly established to be questioned."[112]

In addition to the regulation of the rates which insurance companies may charge, the constitutionality of which was established in the *German Alliance Insurance Co.* case,[113] the contract which they may offer may be prescribed for them by the state.[114] An insurance company may be penalized in favor of a claimant, for delay caused by contesting a claim by a suit at law.[115]

Bankruptcy and Insolvency Laws as Deprivations of Property Rights

If A owes B $1,000, B has certain property rights represented by that chose in action against A. Now if A, on his own motion, takes advantage of the bankruptcy statute, B is deprived of part or even all of those rights. The purpose of a bankruptcy statute which includes provisions for voluntary proceedings by the debtor, (as do the more recent ones in this country), is as much to benefit the debtor as to secure equality among creditors, in other words, the obliteration or diminution of B's rights is for a public purpose.[116]

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[111]See *Wessell* v. *Timberlake*, 116 N. E. 43 (Oh., 1916).

[112]See also *Griffith* v. *Connecticut*, 218 U. S. 563 (1910); *Dunham* v. *Gould*, 16 Johns 367.

[113]233 U. S. 389.

[114]*New York Life Ins. Co.* v. *Hardison*, 199 Mass. 190.

[115]*Hartford Life Insurance Co.* v. *Blincoe*, 225 U. S. 129 (1921), and for similar deprivations of property rights of insurance companies, with due process of law, see *Insurance Co.* v. *Smalley*, 233 S. W. 314 (Tex. C. A. 1921); *Wanberg* v. *National, etc., Ins. Co.*, 179 N. W. 666 (N. D., 1920).

[116]*Neal* v. *Clark*, 95 U. S. 704 (1878).

While Congress has been specifically granted power to enact bankruptcy laws, the limitation of the 5th Amendment governs the exercise of this power, as all others;[117] yet of course bankruptcy laws with provision for voluntary proceedings, have been upheld.[118]

Deprivation of rights in Animals

The state has frequently provided for the taking of property rights in animals. It may provide for the compulsory dipping of cattle, an invasion of the right to exclude the right to use, and make other similar deprivations.[119] Statutes authorizing the killing of dogs, horses, hogs, etc., that is, the destruction of all rights and value in such animals have been upheld.[120] Stock running at large, may be sold,[121] and the right to possess wild game, fish and other animals may be taken away.[122]

The subject of property rights in animals not only is fruitful as illustrating the power of the State to diminish or even take away all rights in such objects, but is an interesting illustration of the nature of those rights themselves. At common law there were no property rights in dogs, for example,[123] and there could be no larceny of a dog at common law.[124] But statutes have now quite generally extended

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[117] *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 336 (1893).

[118] *Hanover National Bank v. Moyses*, 186 U. S. 181 (1902); *Thomas v. Woods*, 173 Fed. 585.

[119] *See Brazeale v. Strength*, 196 S. W. 247 (1917); *Whitaker v. Parsons*, 86 So. 247 (Fla., 1920); *Serres v. Hammond*, 214 S. W. 596 (Tex. Civ. App., 1919).

[120] *See, e. g., Holmes v. Murray*, 207 Mo. 413 (1907); *Ross v. Lever Board*, 83 Ark. 176 (1907).

[121] *See Howell v. Daugket*, 226 S. W. 559 (Ark., 1921).

[122] *See New York v. Hesterberg*, 211 U. S. 31 (1908); *State v. Pollock*, 175 N. W. 557 (S. Dak., 1920).

[123] *Cincinnati, etc., R. R. v. Ford*, 129 Tenn. 291 (1918).

[124] *Reg. v. Robinson*, Bell. C. C., 34; 4 Blackstone's Comm., p. 236, Hale, Pleas of the Crown, p. 511.

the state's protection to the possessor of a dog,[125] so that the same rights of property exist as to dogs as to so-called *domitae naturae*, such as horses, cattle and sheep, in which all the rights of property exist which exist in many inanimate things.[126]

It is familiar knowledge that there are certain animals known in the reports as *ferae naturae* in which the law has given very limited property rights, that is, there are fewer sticks in the bundle of rights with reference to *ferae naturae* than with horses, sheep, and cattle, or books and automobiles. Blackstone tells us that at common law the property rights in *ferae naturae* included only the privilege of "hunting, taking and killing them in exclusion of other persons * * * So long as they continue within his liberty he may restrain any stranger from taking them therein, but the instant they depart into another liberty this qualified property ceases * * * A man can have no absolute permanent property in these."[127]

But the state may add to the limited number of property rights described by Blackstone as constituting common law rights in *ferae naturae* and or can even make the number of such rights equal to or similar to those in domesticated animals. And in fact, *ferae naturae* have been made subject to extended property rights in many states; these include fish,[128] oysters,[129] foxes,[130] bears,[131] and many others.

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[125]These statutes seem to begin with 10 Geo. III, ch. 18 (1770); see *Rex* v. *Helps*, 3 M. & S. 331. See, on the extent of present property rights, *Jenkins* v. *Ballantyne*, 8 Utah 245.

[126]See *Blair* v. *Forehand*, 100 Mass. 136; 2 Blackstone's Comm., p. 390.

[127]2 Blackstone's Comm., p. 394; see also *Young* v. *Hitchens*, 6 Q. B. D. 606 (1844).

[128]*People* v. *Bridges*, 142 Ill. 30 (1892); *State* v. *Snowman*, 94 Me. 99 (1900); *Dunham* v. *Lamphere*, 3 Gray (Mass.) 268 (1855); *Lincoln* v. *Davis*, 53 Mich. 375 (1884).

[129]*Martin* v. *Waddell*, 16 Pet. (U. S.) 367 (1842); *McCready* v. *Virginia*, 94 U. S. 391 (1877); *Proctor* v. *Wells*, 103 Mass. 216 (1869).

[130]*Pierson* v. *Post*, 3 Cai. (N. Y.) 175.

[131]*Bostock-Ferari Amusement Co.* v. *Brocksmith*, 34 Ind. A. 466.

Destruction of the res itself

The power of the state to destroy things attached to the soil, denominated realty, and thus all property rights of the owner, which has already been discussed, exists with reference to chattels as well, and is frequently exercised. A typical case is *North American Cold Storage Co.* v. *Chicago*, 211 U. S. 306 (1908) in which the Supreme Court upheld the summary destruction of food kept in cold storage for a certain length of time. The summary seizure and destruction of a fish net was upheld in the leading case of *Lawton* v. *Steele*, 152 U. S. 133 (1894). Destruction of animals has already been mentioned. There are many cases upholding statutes, ordinances or administrative rulings confiscating and destroying gambling machines, burglar's tools, obscene pictures, counterfeiters' tools, and numerous other chattels often described as "inherently pernicious."[132]

Throughout this discussion we have concentrated upon the diminution of property rights through action of some legislative body. Such a method of demonstrating the power of the law-makers over property rights seemed simpler and more graphic than a detailed discussion of such deprivations through successive decisions of the courts. That the same process goes on, although perhaps at a slower rate, through the law-makers sitting upon the bench there can be no doubt. The recognition of new property rights by courts of equity, such as those upon which labor injunctions have been rested,[133] and the long line of cases restraining interference with advantageous relations,[134] so-called, is a familiar phenomenon; analogical instances occur throughout the other field of the law.

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[132] See *State* v. *Derry*, 171 Ind. 18 (1908), where it was said of such chattels, that "no absolute dominion or property right can exist in them," p. 21.

[133] See Brandeis, J., dissenting in *Truax* v. *Corrigan*, 257 U. S. 312, 341 (1921), and Hayre, Cases on Labor Law, 717 ff.

[134] See Chaffee, Cases on Equitable Relief Against Torts, ch. I, Sec. V B, p. 81 ff, and Pound, Cases on Equitable Relief Against Defamation and Injuries to Personality.

CONCLUSION.

What is the meaning and effect of the constitutional prohibition against depriving persons of property without due process of law? To answer such a question is, of course, the primary purpose of this entire discussion.

This is not a subject upon which one may safely be dogmatic, but of some things which the Constitution does *not* mean we may speak with assurance. It does *not* mean that specific rights of property as they existed at the time of the adoption of the Constitution, or at the time of the legislation subjected to challenge, may not be taken away. We have seen in case after case that property rights of every kind have been taken away by legislation, and have seen such legislation consistently upheld by the highest courts of the land.

Our first conclusion is, therefore, *that the due process clause does not prevent the taking of property rights without compensation.* The constitutional prohibition does not forbid the deprivation of property rights by governmental action. And yet counsel in case after case we have discussed herein have apparently assumed that the constitutional question could be answered in this simple manner:

(a) The Constitution in terms forbids the deprivation of property.

(b) This Legislation takes away some right of property.

(c) Therefore, this legislation violates the Constitution.

This type of argument is still being made almost daily in the Supreme Courts of the land. But the truth is that the fact that a property right has been taken away by legislation, has in itself, no constitutional significance; the Constitution forbids, not the *taking* of property, but taking *under certain circumstances*, that is, "without due process of law."

Courts also have frequently sought to evade the real question by the following reasoning:

(a) The Constitution forbids the taking of property rights.

(b) Legislation enacted in the exercise of the "police power" never can be said to take property rights.

(c) Therefore, if this legislation is an exercise of the "police power", there is no taking of property.

The result thus reached, as our subsequent summarization will suggest, is often sound, but the categorical denial that there is a taking of property rights, when in actual *fact* there is, is the kind of reasoning which encourages the grosser error of asserting that the Constitution forbids any taking at all.

Still another fallacy is to be found in opinions which start from the same false premise: that the Constitution forbids the taking of property. These opinions, starting with this premise, have sustained legislation if it resulted in taking away some one or more property *rights*, but did not disturb the title or possession. In sustaining the warehouse act in *Munn* v. *People*, Mr. Chief Justice Breese of the Illinois Supreme Court presented a typical instance of such reasoning. "Does the act of our General Assembly destroy any species of property," asks the learned justice, "or deprive its owner of the use of it? It does not aim at the extinction of these warehouses or any of their attributes. The statute may affect them injuriously to a degree, but it does not say they shall not be allowed to exist at all. The constitutional provision is, no person shall be *deprived* of life, liberty or property, etc. [Italics in original.] This clause nowhere declares that, in the exercise of the admitted functions of government, private property may not receive remote and consequent injury. * * * By the law under consideration [regulating rates for grain elevators] no right of property is taken away or destroyed. All the property the owners ever possessed in this business remains to them untouched by the strong hand of legislative power."

69 Ill. 80, 88, 89, 90. (1873) The true view is that expressed in many other cases, epitomized by Professor Freund in his work on the Police Power, p. 549 (1904):

> "But the constitutional protection of property rights cannot in reason be satisfied by leaving the bare possession stripped of its economic value, and a prohibition of profitable use is to all intents and purposes a taking of property."

The concept of Mr. Chief Justice Breese and those numerous judges who pursue the same illusion, entirely ignores the realities, entirely ignores the fact that property is a "bundle of rights".

The starting point, from which one can proceed to an understanding of the problem, is simply that under the constitution, property rights may be taken by the law-makers, have always been so taken, and must continue to be so taken, without compensation, so long as men live in communities. **The prohibition is not against the taking of property, but the taking without due process of law.**

What constitutes due process of law, in this inevitable taking of property rights through the operation of general laws, has never been defined, and can no more be defined than what is "just". "Due process of law" is a *variable*, depending upon the time, the place, the balance between the public need and the private burden,[185] and upon the

[185] In *Hudson County Water Co. v. McCarter*, 209 U. S. 349 (1908), Mr. Justice Holmes, speaking for the court, said, p. 355:

> "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail."

mores of the people of a particular community at a particular time. In 1876 the recent Rent Law or Zoning law cases would surely have been decided the other way. In 1826 *Munn* v. *Illinois* would certainly have not been regarded as sound law. What is due process in 1926 and what will be due process in 1946 are two entirely different questions, depending for their solution, not upon learned references to decided cases and quotations from the "authorities", but upon the standards and needs of the times.

Due process of law, in brief, means simply what is reasonable. It condemns what is unreasonable, spoliative, and arbitrary. The prohibition that no person be deprived of property without due process of law means simply that in taking away property rights the law-makers must observe certain indefinite but persistent standards of fairness not only as to procedure, but as to matters of substance as well.

One standard requires that property rights which are taken must be taken and used for a *public* purpose which is reasonably expressed in the legislation. The property of A cannot be taken by a statute and given to B. The public purpose must be the genuine moving force behind the enactment. Legislation taking away C's property rights, enacted ostensibly to conserve the public health, must not be a mere subterfuge working to the private benefit of D. Legislation taking away the property rights of carrier E, enacted as a regulation of interstate commerce, must not be simply a blind, with the real purpose of enriching F.

A second standard requires that when property is taken from an *individual* for public *use* just compensation must be made. But if a property right is taken away from all persons similarly situated because their private rights conflict with public rights then the taking does not violate the "just compensation" clause and if reasonably done for a reasonable purpose there will be "due process of law."

To search for a phrase which will accurately express the whole meaning of "due process of law" is probably to seek the impossible, but we may agree with the great constitutional lawyer, Judge Cooley that "we have met in no judicial decision a statement that embodies more tersely and accurately the correct view"[136] than the statement of Mr. Justice Johnson of the United States Supreme Court:

> "As to the words from Magna Charta incorporated in the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this—that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."[137]

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[136] Cooley, Constitutional Limitations, 7th Ed. (1903), p. 505.

[137] *Bank of Columbia v. Okely*, 4 Wheat. (U. S.) 235, 244.

APPENDIX B.

Limitations Upon Carrier Property Rights Specifically Imposed by the Interstate Commerce Act.

(A) LIMITATIONS UPON THE RIGHT TO USE

I. Upon the right to fix the price for use:

1. Charges must be reasonable. Sec. 1 (5).
2. No greater for long than short haul. Sec. 4 (1). See Intermountain Rate Cases, 234 U. S. 476 (1914).
3. No "free" transportation. Sec. 1 (7). As to inconsistent contract see Louisville etc. R. v. Mottley, 219 U. S. 467 (1911).
4. No discrimination. Sec. 13 (4), Sec. 15 (1) (2).
5. Price (rate) chargeable can be fixed by Commission. Sec. 15 (1) (2), Sec. 15a (3).
6. No change of rates without notice. Sec. 6 (3).
7. Joint charges must be divided as directed by Commission, not by private arrangement. Sec. 15 (6).
8. Must charge cash; cannot extend credit. Sec. 3 (2).
9. Charge collected must be same as that filed. Sec. 6 (7). Even if contract fixes lower price. Gulf etc. R. Co. v. Hefley, 158 U. S. 98 (1895); Louisville etc. R. v. Mottley, 219 U. S. 467 (1911).
10. Charge must be based upon "value" of other properties, i. e., "aggregate value." Sec. 15a (2). See Dayton-Goose Creek Ry. v. United States, 263 U. S. 456 (1923).
11. Profits over certain amount must be surrendered. Sec. 15a (5) (6).

II. Upon the right to use as the carrier sees fit:

1. No carrier can extend nor abandon lines, without authority. Sec. 1 (18).
2. Commission can force capital expenditures for new lines. Sec. 402 (21), Sec. 1 (21).
3. Duty to construct and operate switch connections. Sec. 1 (9).
4. Commission can require carrier to share terminal. Sec. 6 (13) [a]).
5. Carrier cannot transport article owned. Sec. 1 (8). Constitutional: Delaware etc. R. v. United States, 231 U. S. 363 (1913).
6. Through routes may be compelled. Sec. 1 (4), Sec. 15 (3) (6).
7. Traffic inter-change may be required. Sec. 3 (3).
8. Carriers cannot pool frieght without consent of Commission. Sec. 5 (1).
9. Commission may itself route traffic. Sec. 1 (16).
10. Duty to distribute coal cars under rules. Sec. 1 (12).

11. Duty toward livestock. Sec. 15 (5).
12. Carriers may destroy only those records specified by Commission. Sec. 20 (7).
13. Carriers cannot pay dividends from funds properly capital account. Sec. 20a (12).
14. Carrier earning more than "fair return" must hold part and transfer part to the Commission. Sec. 15a (5) (6).
15. Carriers must classify properties carried. Sec. 1 (6).

(B) LIMITATIONS UPON THE RIGHT TO ACQUIRE.

1. Carriers can not own commodities carried. Sec. 1 (8).
2. Carriers can not own competing water carrier. Sec. 5 (2) second.
3. Consolidation subject to Commission approval. Sec. 5 (6).
4. Carrier can not buy plant or loading services of shipper except as Commission directs. Sec. 15 (13). See Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42.
5. Carrier may be directed to acquire new lines, extensions, etc. Sec. 1 (21).
6. Carrier can not acquire funds by security issues except by authority. Sec. 20a (2) (11).

(C) LIMITATIONS UPON RIGHT TO EXCLUDE OTHERS.

1. Carriers may be required to share terminal with outsiders. Sec. 3 (4).
2. Carriers' methods, accounts, properties, financial affairs, etc., subject to inspection, etc., by Commission. Sec. 12, Sec. 20, Sec. 19a, Fifth (e).
3. Carriers must permit public inspection of schedules, traffic contracts, etc. Sec. 6 (1) (5) (7) (11).
4. Carriers' accounting system, allocation of charges, etc., may be set by Commission. Sec. 20 (1) (5). See Interstate Commerce Commission v. Goodrich, 224 U. S. 194.
5. Carrier can not grant use of facilities to one shipper or connecting line and exclude another, if result is discrimination. Sec. 2, Sec. 3.
6. Carrier under duty to extend use of facilities. Sec. 1 (4) (10) (11) (13) (14) (15).
7. Carrier must route cars as shipper directs, or Commission may itself route. Sec. 1 (16), Sec. 15 (10) (18).

(D) LIMITATIONS UPON RIGHT TO DISPOSE.

1. Carrier may not dispose of surplus over "fair return". Sec. 15a (5) (6).
2. Carrier can not pay dividends out of capital account fund. Sec. 20a (12).
3. Carrier may be ordered to refund rates found unreasonable. Sec. 15 (7).
4. Carrier may destroy only those records specified. Sec. 20 (7).
5. Carrier can not sell securities not authorized. Sec. 20a (2) (11).

APPENDIX C.

Sections 15a and 19a of the Interstate Commerce Act.

SECTION 15a. [*Added February 28, 1920.*] (1) When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices, relating thereto; the term "carrier" means a carrier by railroad or partly by railroad and party by water, within the continental United States, subject to this Act, excluding (a) sleeping-car companies and express companies, (b) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight, and (d) any belt-line railroad, terminal switching railroad, or other terminal facility, owned exclusively and maintained, operated, and controlled by any State or political subdivision thereof; and the term "net railway operating income" means railway operating income, including in the computation thereof debits and credits arising from equipment rents and joint facility rents.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property

of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided*, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account.

(4) For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. The Commission may utilize the results of its investigation under section 19a of this Act, in so far as deemed by it available, and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to section

19a of this Act the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value.

(5) Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States.

(6) If, under the provisions of this section, any carrier receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described. For the purposes of this paragraph the value of the railway property and the net railway operating income of a group of carriers, which the Commission finds are under common control and management and are operated as

a single system, shall be computed for the system as a whole irrespective of the separate ownership and accounting returns of the various parts of such system. In the case of any carrier which has accepted the provisions of section 209[1] of this amendatory Act the provisions of this paragraph shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property shall be determined by the Commission in the manner provided in paragraph (4).

(7) For the purpose of paying dividends or interest on its stocks, bonds or other securities, or rent for leased roads, a carrier may draw from the reserve fund established and maintained by it under the provisions of this section to the extent that its net railway operating income for any year is less than a sum equal to 6 per centum of the value of the railway property held for and used by it in the service of transportation, determined as provided in paragraph (6); but such fund shall not be drawn upon for any other purpose.

(8) Such reserve fund need not be accumlated and maintained by any carrier beyond a sum equal to 5 per centum of the value of its railway property determined as herein provided, and when such fund is so accumulated and maintained the portion of its excess income which the carrier is permitted to retain under paragraph (6) may be used by it for any lawful purpose.

(9) The Commission shall prescribe rules and regulations for the determination and recovery of the excess income payable to it under this section, and may require such security and prescribe such reasonable terms and conditions in connection therewith as it may find necessary. The Commission shall make proper adjustments to provide for the computation of excess income for a portion of a year, and for a year in which a change in the

percentage constituting a fair return or in the value of a carrier's railway property becomes effective.

(10) The general railroad contingent fund so to be recoverable by and paid to the Commission and all accretions thereof shall be a revolving fund and shall be administered by the Commission. It shall be used by the Commission in furtherance of the public interest in railway transportation either by making loans to carriers to meet expenditures for capital account or to refund maturing securities originally issued for capital account, or by purchasing transportation equipment and facilities and leasing the same to carriers, as hereinafter provided. Any moneys in the fund not so employed shall be invested in obligations of the United States or deposited in authorized depositaries of the United States subject to the rules promulgated from time to time by the Secretary of the Treasury relating to Government deposits.

(11) A carrier may at any time make application to the Commission for a loan from the general railroad contingent fund, setting forth the amount of the loan and the term for which it is desired, the purpose of the loan and the uses to which it will be applied, the present and prospective ability of the applicant to repay the loan and meet the requirements of its obligations in that regard, the character and value of the security offered, and the extent to which the public convenience and necessity will be served. The application shall be accompanied by statements showing such facts and details as the Commission may require with respect to the physical situation, ownership, capitalization, indebtedness, contract obligations, operations, and earning power of the applicant, together with such other facts relating to the propriety and expediency of granting the loan applied for and the ability of the applicant to make good the obligation, as the Commission may deem pertinent to the inquiry.

(12) If the Commission, after such hearing and investigation, with or without notice, as it may direct, finds that the making, in whole or in part, of the proposed loan from the general railroad contingent fund is necessary to enable the applicant properly to meet the transportation needs of the public, and that the prospective earning power of the applicant and the character and value of the security offered are such as to furnish reasonable assurance of the applicant's ability to repay the loan within the time fixed therefor, and to meet its other obligations in connection with such loan, the Commission may make a loan to the applicant from such railroad contingent fund, in such amount, for such length of time, and under such terms and conditions as it may deem proper. The Commission shall also prescribe the security to be furnished, which shall be adequate to secure the loan. All such loans shall bear interest at the rate of 6 per centum per annum, payable semiannually to the Commission. Such loans when repaid, and all interest paid thereon, shall be placed in the general railroad contingent fund.

(13) A carrier may at any time make application to the Commission for the lease to it of transportation equipment or facilities, purchased from the general railroad contingent fund, setting forth the kind and amount of such equipment or facilities and the term for which it is desired to be leased, the uses to which it is proposed to put such equipment or facilities, the present and prospective ability of the applicant to pay the rental charges thereon and to meet the requirements of its obligations under the lease, and the extent to which the public convenience and necessity will be served. The application shall be accompanied by statements showing such facts and details as the Commission may require with respect to the physical situation, ownership, capitalization, indebtedness, contract obligations, operation and earning power of the applicant, to-

gether with such other facts relating to the propriety and expediency of leasing such equipment or facilities to the applicant as the Commission may deem pertinent to the inquiry.

(14) If the Commission, after such hearing and investigation, with or without notice, as it may direct, finds that the leasing to the applicant of such equipment or facilities, in whole or in part, is necessary to enable the applicant properly to meet the transportation needs of the public, and that the prospective earning power of the applicant is such as to furnish reasonable assurance of the applicant's ability to pay promptly the rental charges and meet its other obligations under such lease, the Commission may lease such equipment or facilities purchased by it from the general railroad contingent fund, to the applicant for such length of time, and under such terms and conditions as it may deem proper. The rental charges provided in every such lease shall be at least sufficient to pay a return of 6 per centum per annum plus allowance for depreciation determined as provided in paragraph (5) of section 20 of this Act, upon the value of the equipment or facilities leased thereunder. All rental charges and other payments received by the Commission in connection with such equipment and facilities, including amounts received under any sale thereof, shall be placed in the general railroad contingent fund.

(15) The Commission may from time to time purchase, contract for the construction, repair and replacement of, and sell, equipment and facilities, and enter into and carry out contracts and other obligations in connection therewith, to the extent that moneys included in the general railroad contingent fund are available therefor, and in so far as necessary to enable it to secure and supply equipment and facilities to carriers whose applications therefor are ap-

proved under the provisions of this section, and to maintain and dispose of such equipment and facilities.

(16) The Commission may from time to time prescribe such rules and regulations as it deems necessary to carry out the provisions of this section respecting the making of loans and the lease of equipment and facilities.

(17) The provisions of this section shall not be construed as depriving shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates, or rates excessive in their relation to other rates, but no shipper shall be entitled to recover upon the sole ground that any particular rate may reflect a proportion of excess income to be paid by the carrier to the Commission in the public interest under the provisions of this section.

(18) Any carrier, or any corporation organized to construct and operate a railroad, proposing to undertake the construction and operation of a new line of railroad may apply to the Commission for permission to retain for a period not to exceed ten years all or any part of its earnings derived from such new construction in excess of the amount heretofore in this section provided, for such disposition as it may lawfully make of the same, and the Commission may, in its discretion, grant such permission, conditioned, however, upon the completion of the work of construction within a period to be designated by the Commission in its order granting such permission.

SEC. 19a. [*As amended February 28, 1920, and June 7, 1922.*] (a) That the Commission shall, as hereinafter provided, investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this Act. To enable the Commission to make such investigation and report, it is authorized to employ such experts and other assistants as may be nec-

essary. The Commission may appoint examiners who shall have power to administer oaths, examine witnesses, and take testimony. The Commission shall make an inventory which shall list the property of every common carrier subject to the provisions of this Act in detail, and show the value thereof as hereinafter provided, and shall classify the physical property, as nearly as practicable, in conformity with the classification of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission.

(b) First. In such investigation said Commission shall ascertain and report in detail as to each piece of property, other than land, owned or used by said common carrier for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reason for their differences, if any. The Commission shall in like manner ascertain and report separately other values, and elements of value, if any, of the property of such common carrier, and an analysis of the methods of valuation employed, and of the reasons for any differences between any such value and each of the foregoing cost values.

Second. Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same.

Third. Such investigation and report shall show separately the property held for purposes other than those of a common carrier, and the original cost and present value of the same, together with an analysis of the methods of valuation employed.

Fourth. In ascertaining the original cost to date of the property of such common carrier the Commission, in addition to such other elements as it may deem necessary shall investigate and report upon the history and organization of the present and of any previous corporation operating such property; upon any increases or decreases of stocks, bonds, or other securities, in any reorganization upon moneys received by any such corporation by reason of any issues of stocks, bonds, or other securities; upon the syndicating, banking, and other financial arrangements under which such issues were made and the expense thereof; and upon the net and gross earnings of such corporations; and shall also ascertain and report in such detail as may be determined by the Commission upon the expenditure of all moneys and the purposes for which the same were expended.

Fifth. The Commission shall ascertain and report the amount and value of any aid, gift, grant of right of way, or donation, made to any such common carrier, or to any previous corporation operating such property, by the Government of the United States or by any State, county or municipal government, or by individuals, associations, or corporations; and it shall also ascertain and report the grants of land to any such common carrier, or any previous corporation operating such property, by the Government of the United States, or by any State, county, or municipal government, and the amount of money derived from the sale of any portion of such grants and the value of the unsold portion thereof at the time acquired and at the present time, also, the amount and value of any concession and allowance made by such common carrier to the Government of the United States, or to any State, county, or municipal government in consideration of such aid, gift, grant, or donation.

(c) Except as herein otherwise provided, the Commission shall have power to prescribe the method of procedure to be followed in the conduct of the investigation, the form in which the results of the valuations shall be submitted, and the classification of the elements that constitute the ascertained value, and such investigation shall show the value of the property of every common carrier as a whole and separately the value of its property in each of the several States and Territories and the District of Columbia, classified and in detail as herein required.

(d) Such investigation shall be commenced within sixty days after approval of this Act and shall be prosecuted with diligence and thoroughness, and the result thereof reported to Congress at the beginning of each regular session thereafter until completed.

(e) Every common carrier subject to the provisions of this Act shall furnish to the Commission or its agents from time to time and as the Commission may require maps, profiles, contracts, reports of engineers, and any other documents, records, and papers, or copies of any or all of the same, in aid of such investigation and determination of the value of the property of said common carrier, and shall grant to all agents of the Commission free access to its right of way, its property, and its accounts, records, and memoranda whenever and wherever requested by any such duly authorized agent, and every common carrier is hereby directed and required to co-operate with and aid the Commission in the work of the valuation of its property in such further particulars and to such extent as the Commission may require and direct, and all rules and regulations made by the Commission for the purpose of administering the provisions of this section and section twenty of this Act shall have the full force and effect of law. Unless otherwise ordered by the Commission, with the reasons therefor,

the records and data of the Commission shall be open to the inspection and examination of the public.

(f) Upon the completion of the valuation herein provided for the Commission shall thereafter in like manner keep itself informed of all extensions and improvements or other changes in the condition and value of the property of all common carriers, and shall ascertain the value thereof, and shall from time to time, revise and correct its valuations, showing such revision and correction classified and as a whole and separately in each of the several States and Territories and the District of Columbia, which valuation, both original and corrected, shall be tentative valuations and shall be reported to Congress at the beginning of each regular session.

(g) To enable the Commission to make such changes and corrections in its valuations of each class of property, every common carrier subject to the provisions of this Act shall make such reports and furnish such information as the Commission may require.

(h) Whenever the Commission shall have completed the tentative valuation of the property of any common carrier, as herein directed, and before such valuation shall become final, the Commission shall give notice by registered letter to the said carrier, the Attorney General of the United States, the governor of any State in which the property so valued is located, and to such additional parties as the Commission may prescribe, stating the valuation placed upon the several classes of property of said carrier, and shall allow thirty days in which to file a protest of the same with the Commission. If no protest is filed within thirty days, said valuation shall become final as of the date thereof.

(i) If notice of protest is filed the Commission shall fix a time for hearing the same, and shall proceed as promptly

as may be to hear and consider any matter relative and material thereto which may be presented in support of any such protest so filed as aforesaid. If after hearing any protest of such tentative valuation under the provisions of this Act the Commission shall be of the opinion that its valuation shall not become final, it shall make such changes as may be necessary, and shall issue an order making such corrected tentative valuation final as of the date thereof. All final valuations by the Commission and the classification thereof shall be published and shall be prima facie evidence of the value of the property in all proceedings under the Act to regulate commerce as of the date of the fixing thereof, and in all judicial proceedings for the enforcement of the Act approved February fourth, eighteen hundred and eighty-seven, commonly known as "the Act to regulate commerce," and the various Acts amendatory thereof, and in all judicial proceedings brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission.

(j) If upon the trial of any action involving a final value fixed by the Commission, evidence shall be introduced regarding such value which is found by the court to be different from that offered upon the hearing before the Commission, or additional thereto and substantially affecting said value, the court, before proceeding to render judgment shall transmit a copy of such evidence to the Commission, and shall stay further proceedings in said action for such time as the court shall determine from the date of such transmission. Upon the receipt of such evidence the Commission shall consider the same and may fix a final value different from the one fixed in the first instance, and may alter, modify, amend or rescind any order which it has made involving said final value, and shall report its action thereon to said court within the time fixed by the court. If the Commission shall alter, modify, or amend its

order, such altered, modified, or amended order shall take the place of the original order complained of and judgment shall be rendered thereon as though made by the Commission in the first instance. If the original order shall not be rescinded or changed by the Commission, judgment shall be rendered upon such original order.

(k) The provisions of this section shall apply to receivers of carriers and operating trustees. In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with all the requirements of this section and in the manner prescribed by the Commission such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in section sixteen of the Act to regulate commerce.

(l) That the district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this section by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of this section.